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FALLBROOK UNION HIGH SCHOOL DISTRICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARY STRUBLE, As Conservator for CS,) CASE NO. 07CV 2328 LAB (cab)
)
Plaintiff/Counterdefendant,)
) FALLBROOK UNION HIGH SCHOOL
v.) DISTRICT REPLY AND RESPONSE TO
) PLAINTIFF'S OPENING BRIEF FOR
FALLBROOK UNION HIGH SCHOOL) HEARING ON CROSS-MOTIONS FOR
DISTRICT, a Local Educational Agency,) PARTIAL REVERSAL OF
) ADMINISTRATIVE DECISION
)
Defendant/Counterclaimant.) Hearing: August 1, 2008
)

Defendant FALLBROOK UNION HIGH SCHOOL DISTRICT ("District") hereby files its
Reply and Response Brief in the above-referenced matter.

I
PLAINTIFF HAS ABANDONED CLAIMS

It is well established in the Ninth Circuit that claims which are not addressed in an
appellant's brief are deemed abandoned. *Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir.
1988) (citing to *Kates v. Crocker National Bank*, 776 F.2d 1396, 1397 n. 1 (9th Cir.1985), and
Simpson v. Union Oil Company of California, 411 F.2d 897, 900 n. 2 (9th Cir.).

As in her Complaint, Plaintiff fails to address the claims on which the District prevailed at
the due process hearing. This Court should hold that the District prevailed on Issues 1.c, 1.d, 1.e,

1 2.b, 2.c, 2.d, 2.e, 2.f, 2.g, 2.h, and 2.j, as those issues are outlined in the Decision at pages 2-3,
2 because Plaintiff has waived the issues. *Id.*

3 Plaintiff has also waived and abandoned all claims pertaining to the 2005-2006 school year
4 and claims pertaining to handwriting goals for any school year because she failed to address the
5 claims in her Opening Brief. *Id.*, see also Plaintiff's Opening Brief, 1:9-17 (characterizing the
6 claims as pertaining to the 2006-2007 and 2007-2008 school years with regard to alleged
7 predetermination of placement offer and failure to advise parents of options for graduation); 1:18-
8 2:5 (discussing the Hearing Officer's decision with regards to alleged predetermination in June
9 2007); 3:3-7 (characterizing Plaintiff's appeal/Complaint as pertaining to the claims of alleged
10 failure to advise parents of options for graduation and alleged offer of a predetermined placement);
11 3:12-15 (asserting that the claims pertain to the 2006-2007 and 2007-2008 school years); 10:14-17
12 (asserting that Plaintiff met her burden of proof with regard to graduation options and
13 predetermination).
14

15
16 Plaintiff moved and was granted leave to supplement the administrative record with a copy
17 of the February 7, 2008 IEP and provided a declaration that pertained to the District's conduct and
18 offer of FAPE at the February 7, 2008 IEP team meeting. However, Plaintiff, in her Opening
19 Brief, failed to ask this Court to consider any issue with regard to the February 7, 2008
20 Individualized Education Program ("IEP") or IEP team meeting. Plaintiff, therefore, has also
21 waived and abandoned any implied assertion that this Court should consider claims with regard to
22 Student's February 7, 2008 IEP or team meeting. *Id.*
23

24 In addition, any issue pertaining to the February 7, 2008 IEP and team meeting is
25 improperly before this Court because Plaintiff has failed to exhaust her administrative remedies.
26 *Hoefl v. Tucson Unified School District*, 967 F.2d 1298, 1303 (9th Cir. 1992). Plaintiff's claim that
27 she has exhausted her administrative remedies, Plaintiff's Opening Brief, 9:1-10:12, is only with
28 regard to matters that were before the hearing officer and, of course, the February 7, 2008 IEP and

team meeting were not before the hearing officer.

II THE DISTRICT HAS ALWAYS OFFERED A FREE APPROPRIATE PUBLIC EDUCATION

A. The District provided Plaintiff with options for graduation by adequately informing her that Student was on a track to obtain a certificate of achievement/completion.

Plaintiff does not assert that the District failed to provide her with copies of the unambiguous and unequivocal statement that Student was not diploma bound in his IEPs.

Administrative Record Page No.	Description
02133, 02137	5/21/03 IEP providing that the CAPA rather than the California standardized test would be taken
02136	5/21/03 IEP providing that Student could comprehend at an emerging fourth grade level and could compute at a third grade level
01496, 01499	1/13/04 IEP providing functional goals and providing that Student does well with a functional skills program
02080	5/11/04 IEP providing that Student was preparing for a Certificate of Achievement
02080	5/11/04 IEP providing that Student would not participate in general education academics because of academic needs
02081	5/11/04 IEP providing that Student computed at a third grade level and comprehended passages at a fifth grade level
02062	11/3/04 IEP providing that Student would not take California standardized assessments at Plaintiff's request
02063, 0264, 02065, 02066, 02067, 02068	11/3/04 IEP providing that Student read at either the 5.1 or 5.6 grade level and performed math at either the 3.3 or 2.9 grade level
02072	11/3/04 IEP providing that Student's significant academic delays may adversely affect success in the general core curriculum, and Student would not participate in general education Math, Social Studies, Science, and English because of significant academic delays
02227	11/3/04 Individual Summary of Assessment providing that District assessments of Student's academic and functional assessments showed that Student had significant delays in all academic areas
02230	11/3/04 State or District Wide Assessment providing that Student would not take California standardized assessments because of significant academic delays in all areas
02230, 02072	11/3/04 IEP providing that Student's IEP team anticipated that Student would not be candidate for a regular high school diploma but rather would be a candidate for a certificate of achievement/completion
02044	11/30/05 IEP providing that Student would not take state standardized assessments at her request
02046	11/30/05 IEP providing that Student could multiply with 70% accuracy with a double digit multiplier

1	02046	11/30/05 IEP providing that significant academic delays may adversely affect success in the general core curriculum and Student would not participate in general education Math, Social Studies, Science, and Language Arts because of significant academic delays
2		
3	02047, 02049	11/30/05 IEP providing that Student read at the level of a beginning 7th grader
4	02053	11/30/05 IEP providing that Student would obtain a Letter / Certificate rather than a diploma
5	02226	11/30/05 State or District Wide Assessment providing that Student would only take the state's standardized test in Reading because significant academic delays in all areas preclude success on all/any California standardized assessments
6		
7		
8	02226	11/30/05 State of District Wide Assessment providing that the IEP team anticipated that Student would not be candidate for a regular high school diploma but rather would be a candidate for a certificate of achievement / completion
9		
10	02035	11/27/06 IEP providing that Student could solve word problems when given the mathematical function
11	02039	11/27/06 IEP providing that(11/27/06 IEP providing that Student would participate in a high school curriculum leading to a Certificate of Completion
12		
13	02042	11/27/06 IEP providing that Student must pass the CAHSEE to earn a diploma and that Student had not passed CAHSEE English and Language Arts, CAHSEE Math, and Algebra 1
14		
15	02043	11/27/06 IEP providing that the IEP team intended Student to attend a District program for fall 2007
16	01976	5/10/07 IEP providing that Student would exit high school with other than a diploma
17	01980	5/10/07 IEP providing that Student would participate in a curriculum leading to a Certificate of Completion
18	01979	5/10/07 IEP providing that the IEP team intended Student to attend a District program in 2007-2008
19		
20	01950	6/7/07 IEP providing that Student would exit high school with other than a diploma
21	01958, 01960, 01961	6/7/07 IEP providing that Student at the time could read at a functional level and choose the correct mathematical operation in a one-step word problem
22		
23	01965	6/7/07 IEP providing that the IEP team intended Student to attend a District program in 2007-2008, 01962, and that Student would participate in a high school curriculum leading to a Certificate of Completion
24		
25	01966	6/7/07 IEP providing that Student must pass the CAHSEE to earn a diploma and that Student had not passed CAHSEE English and Language Arts, CAHSEE Math, and Algebra 1
26		
27		
28		

1 In fact, Plaintiff does not assert that the District failed to provide her with a copy of any
2 evidence submitted by the District in support of its contention that she was informed and knew that
3 Student was not diploma bound.

4 **B. The District did not predetermine Student's placement in June 2007.**

5 A review of a predetermination decision is *de novo*, since it is mixed question of law and
6 fact. *See, e.g., Deal v. Hamilton County Board of Education*, 392 F.3d 840, 857 (6th Cir. 2004)
7 (noting that a review of a predetermination decision is a mixed question of law and fact).

8 At or about the time of the June 2007 IEP team meeting:¹

- 9 1. Student's academic achievement was measured by the District as below average in
10 Broad Reading, Reading Comprehension, Broad Math, Math Calculation Skills,
11 Academic Skills, Academic Fluency, and Academic Knowledge. 02205 (results of
12 Woodcock-Johnson Tests of Achievement (3d ed.) reported in the District's April
13 26, 2007 Psychological Report. 02205.
- 14 2. Student had not taken either the English or the Math portions of the California High
15 School Exit Exam ("CAHSEE"). 01986 (transcript dated June 7, 2007). It did not
16 appear that Student could pass either parts of the CAHSEE. 01365:01365:6-
17 01366:4.²
- 18 3. Student's Reading Comprehension was measured in the second percentile for those
19 students who were up to the age of 15.³ 01699 (August 1, 2007 IEE by Cynthia
20 Norall). In addition, Student could not or would not do the Math Calculation subtest
21 of the Diagnostic Achievement Battery (3d ed.) (DAB-3"), 00202:11-13, and could
22 not or would not perform the Contextual Language (Writing) and Story
23 Construction subtests of the DAB-3, and wrote only one sentence on each of those

24
25
26 ¹ The June 7, 2007 IEP team meeting was a continuation of a meeting convened on May 10, 2007.

27 ² Contrary to Plaintiff's assertion that no evidence was presented that successful completion of the CAHSEE was
28 necessary to earn a diploma, *see* Plaintiff's Opening Brief, 8:18-20, the District did prove that successful completion of
the CAHSEE was required to obtain a diploma, 01598 (May 10, 2007 Transition Services providing in part,
"Beginning no later than grade 9 parent(s)/guardian, student has been informed that as of the 2005-2006 school year
student must pass the California High School Exit Exam to earn a diploma").

³ Student was age 18-2 at the time of testing. 01692.

subtests, 01699 and 00202:11-13.⁴

4 Student's overall verbal learning ability was below average. 02203-02204
(District's April 2007 Psychological Report).

5. Student's functional independence was in the very low range and was comparable to
that of an average 6.8 year old. 02205 (District's April 2007 Psychological Report).

6. Plaintiff did not expect Student to be able to proficiently use a calculator on +, -, x,
and division using 4 to 5 digits, to proficiently perform 1 variable algebraic
equations with a calculator, or to understand and proficiently multiply, divide, add
and subtract fractions until June 2008, when Student would be nineteen years old.
02352 (annual goals suggested Plaintiff for the June 2007 IEP team meeting).

7. Plaintiff knew that Student could not possibly solve number sense math problems on
the CAHSEE. *See* 01874 (Plaintiff's log for 4/4/07, regarding the impossibility of
Student converting recipe proportions); 01997 (5/10/07 IEP with CAHSEE sample
regarding converting recipe proportions).

8. Plaintiff had taken action to conserve Student.

As noted in the District's Opening Brief, the June 2007 IEP discussed the options of
placement in general education, of Student returning to the high school the following year, or
entering the District's Adult Transition Program. District's Opening Brief, 17:20-18:6.

Mindful that the purpose of the Individuals with Disabilities Education Act ("IDEA") is to
prepare disabled individuals for leading productive and independent adult lives to the maximum
extent possible, 20 U.S.C. § 1400(c)(5)(A)(ii), and after reviewing the goals developed by the
team, including Plaintiff, and reviewing Student's abilities, as evidenced by his achievement at
Fallbrook High School and the results of the District's April 2007 Psychological Report, including
Student's very low functional independence, the IEP team decided that placement in the Adult
Transition Program would provide Student with those skills, including practical math, reading, and
writing skills, necessary to achieve maximum independence and self-sufficiency.

⁴ These results were obtained subsequent to the June 2007 IEP team meeting, and the District, of course, does not
contend that it could possibly have known of the results. However, the District was aware of Student's current
abilities, which were reflected in the results of the IEE.

The June 2007 IEP offered Student a free appropriate public education (“FAPE”) that Plaintiff did not accept. However, the District met its obligation under the IDEA to provide Plaintiff with meaningful participation, and is not required to give Plaintiff a veto power over the District’s offer of FAPE. *See, e.g., Ms. S. ex rel. G. v. Vashon Island School District*, 337 F.3d 1115 (9th Cir. 2003) (superseded by statute on different issue).

III PLAINTIFF HAS FAILED TO PROVE THAT SHE IS ELIGIBLE FOR REIMBURSEMENT OR PLACEMENT OF STUDENT AT FUSION

A. Plaintiff has failed to prove *Carter/Burlington* requirement.

Contrary to Plaintiff’s assertion, the case before this Court does not pertain to reimbursement because Student was unilaterally placed at Fusion subsequent to the Decision of the Hearing Officer. *See* 00038 (Decision dated November 20, 2007); Plaintiff’s Lodged documents Exh. F (Fusion enrollment date of April 1, 2008) and Exhs. G and H (first Fusion session provided on April 15, 2008); Plaintiff’s Opening Brief, 3:15-17 (seeking reimbursement); *see also* District’s Opposition to Motion to Supplement the Administrative Record, 5:26-9:25 and 12:12-14:18 (arguing that with regard to documents pertaining to reimbursement, they are not relevant and would turn this proceeding into a trial *de novo* and Plaintiff failed to exhaust administrative remedies ⁵).

Nevertheless, the United States Supreme Court has made clear that in any case pertaining to private school placement, the student must prove that the private school placement can provide an education that was otherwise proper under the IDEA. *Florence County School District Four v. Carter*, 510 U.S. 7, 12-13, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (“Carter”); *School Committee of Town of Burlington v. Department of Education*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) (“Burlington”).

Plaintiff should be denied any remedy with regard to Fusion because Plaintiff failed to prove the *Carter/Burlington* requirement by failing to prove that Fusion can provide Student with an otherwise proper education under the IDEA. Plaintiff, in fact, proved in the positive that Fusion

⁵ Plaintiff’s reference in her Opening Brief, 9:7-11, to the federal Administrative Procedures Act is inapposite. The federal APA does not apply to California’s due process proceedings.

1 is not an appropriate placement for Student.

2 Student requires special education and related services in order to receive a FAPE yet
3 Fusion does not offer special education. *See* District's Supplemental Response to Plaintiff's
4 Lodged Documents, Exhs. 5 and 6 (it is "false" that Fusion provides special education).
5 Furthermore, none of the documents pertaining to Fusion submitted by Plaintiff indicate that
6 Fusion is capable of providing instruction and services in conformity with an IEP. *See* District's
7 Notice of Lodgment of Documents to Supplement the Administrative Record, Declaration of Sallie
8 Hunt, ¶ 11.

9 A May 1, 2008 report from Fusion written approximately two weeks after Student's
10 placement admits that it is unable to meet Student's needs when the Fusion CEO/Founder wrote:

11 "[Student] is struggling in the social aspect of school. He often misinterprets the actions
12 and body language of fellow students and teachers. He is highly sensitive to any
13 interpretation of injustice and disrespect. There have been negative exchanges between
14 [Student] and either a fellow student or a teacher on a daily basis. All of these altercations,
15 unfortunately, [Student] has provoked. He sees himself as a victim in almost every
16 situation and is unable to alter his perceptions. We had one significant interaction that
17 resulted in [Student] verbally threatening violent action toward 2 female teachers and
18 myself [Fusion CEO and Director]. [Student] would benefit from intense behavior
19 modification training with a trained Autism specialist." Exh. I, p. 3, of Plaintiff's lodged
20 documents.

21 Fusion's inability to provide Student with the behavioral supports that he requires,
22 including behavior modification training for autistic individuals, and failure to provide Student
23 with special education, combined with Fusion's zero tolerance policy on physical violence or
24 intimidation of any kind, 01908, proves that Fusion is not an appropriate placement.

25 **B. Plaintiff has failed to prove any exception to Education Code section 56505.2(a).**

26 Subdivision (a) of section 56505 of the California Education Code provides:

27 "A hearing officer may not render a decision that results in the placement of an individual
28 with exceptional needs in a nonpublic, nonsectarian school, or that results in a service for

1 an individual with exceptional needs provided by a nonpublic, nonsectarian agency, if the
2 school or agency has not been certified pursuant to Section 56366.1.”

3 Fusion has not been certified pursuant to Cal. Educ. Code § 56366.1. *See* District’s
4 Opening Brief, 15:20-23.

5 A student may not be prospectively placed at a private school that is not certified by the
6 state. *Antkowiak v. Ambach*, 838, F.2d 635, 640 (2d Cir. 1988) (“*Antkowiak*”).

7 In *Antkowiak*, the Second Circuit interpreted the requirements of the Education of the
8 Handicapped Act (“EHA”), predecessor to the IDEA. At the time, the EHA at 20 U.S.C. §
9 1413(a)(4)(B)(ii) provided that handicapped children in private placements had the same rights as
10 those in state facilities and required the state must determine whether private facilities at which
11 students are placed meet the same standards that apply to state and local educational agencies. *Id.*
12 at 640.

13 IV 14 PLAINTIFF MISCITES THE LAW

15 In her request for due process, Plaintiff alleged substantive violations (need for OT services
16 for handwriting in 2005-2006 and 2006-2007, insufficient progress to meet 2005-2006 IEP goals,
17 need for a behavioral support plan and behavioral goals in 2005-2006, need for social skills
18 training in 2006-2007, need for a communication log, need for a BSP/BIP in 2006-2007, saying
19 words and taking actions that trigger anxiety in Student, staff insensitivity towards Plaintiff, need
20 for an educational program after 5/3/07, and need for a safe learning environment in 2006-2007),
21 as well as procedural violations (providing graduation options and predetermining the June 2007
22 IEP). Decision, pp. 2-3.

23 Plaintiff incorrectly asserts that *Shapiro v. Paradise Valley Unified School District*, 317
24 F.3d 1072, 1079 (9th Cir. 2003) applies to substantive violations and that, as a result, the hearing
25 officer was not required to considered Plaintiff’s substantive violations once she found procedural
26 violations.
27
28

1 However, the hearing officer was required to decide all issues that Plaintiff placed before
2 her. Cal. Educ. Code § 56507.

3 It is only on claims of procedural violations that a hearing officer is not required to
4 determine whether an IEP was reasonably calculated to confer educational benefit if the hearing
5 officer finds that a procedural violation impeded the child's right to FAPE, significantly impeded
6 parents' participation in the decisionmaking process, or caused a deprivation of educational benefit.
7 20 U.S.C. § 1414(f)(3)(E)(ii); *Shapiro*, 317 F.3d at 1079.

8 *Shapiro* is inapplicable to allegations of substantive violations.
9

10 **V**
CONCLUSION

11 For the foregoing reasons, the District respectfully requests that this Court hold that the
12 District has always provided Student with a FAPE and that Student's June 2007 IEP provides for
13 an appropriate placement, and deny Plaintiff any remedy, attorneys' fees, or costs.
14

15 Dated: July 11, 2008. Respectfully Submitted,

16 FILARSKY & WATT LLP

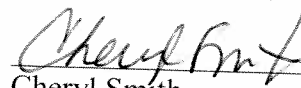
17 By: s/Sharon A. Watt
18 SHARON A. WATT
19 Attorney for Defendant and Counterclaimant
20 FALLBROOK UNION HIGH SCHOOL DISTRICT
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CERTIFICATE OF SERVICE

I declare under penalty of perjury that I am employed in the County of Ventura, State of California and that I am over the age of 18 years and am not a party to this action. My business address is 408 Bryant Circle, Suite C, Ojai, California 93023.

On the date noted below, I served the foregoing document described as **FALLBROOK UNION HIGH SCHOOL DISTRICT REPLY AND RESPONSE TO PLAINTIFF'S OPENING BRIEF FOR HEARING ON CROSS-MOTIONS FOR PARTIAL REVERSAL OF ADMINISTRATIVE DECISION** by serving counsel of record, Ellen Dowd, Esq., electronically, having verified on the Court's CM/ECF website that such counsel is listed to receive email notification for this case and that there are no other attorneys on the manual notice list.

Dated: July 11, 2008


Cheryl Smith